

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

FILED/ACCEPTED  
JUL 13 2007

Federal Communications Commission  
Office of the Secretary

In the Matter of

ARKANSAS CABLE TELECOMMUNICATIONS  
ASSOCIATION; COMCAST OF ARKANSAS, INC.;  
BUFORD COMMUNICATIONS I, L.P. d/b/a  
ALLIANCE COMMUNICATIONS NETWORK;  
WEHCO VIDEO, INC.; COXCOM, INC.; and  
CEBRIDGE ACQUISITION, L.P., d/b/a  
SUDDENLINK COMMUNICATIONS,

*Complainants,*

v.

ENTERGY ARKANSAS, INC.,

*Respondent.*

EB Docket No. 06-53

EB-05-MD-004

To: Office of the Secretary

Attn: The Honorable Arthur I. Steinberg  
Office of the Administrative Law Judge

**OPPOSITION TO UTILITY SUPPORT SYSTEMS, INC.'S MOTION TO STRIKE**

Complainants respectfully submit this Opposition to the Motion to Strike filed by Utility Support Systems, Inc. ("USS") on July 12, 2007. USS' motion should be denied. 1/

USS argues that neither the Commission nor an Administrative Law Judge has the power to enforce compliance with the very subpoenas issued under its authority. USS is flat wrong. It is true, as USS says, that the Commission *may* seek the

1/ Complainants have no objection to USS' "special appearance" in this matter and note that, while USS is not at the moment a party, its involvement in the underlying dispute is relevant to the resolution of the Hearing Designation Order.

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aid of a federal court to compel compliance with a subpoena, and that that option is the one that most clearly would implicate the contempt power. But that does not mean the Hearing Officer is totally powerless to give effect to his own validly issued subpoena. To the contrary, the Commission (and the Hearing Officer or staff acting under delegated authority) has at least three options for achieving subpoena compliance before making a federal case of the matter. Any or all would be appropriate here.

First, the Hearing Officer may issue an order—in the form of an oral ruling or a written order—agreeing with Complainants about the subpoena and mandating that USS obey it. There is nothing in the Commission's Rules or in the Communications Act that forecloses such an approach. Both state that "[i]n case of disobedience" of a subpoena, the Commission "*may* invoke the aid of any court of the United States in requiring . . . the production of documentary evidence." 47 U.S.C. § 409(f); 47 C.F.R. § 1.340 (emphasis added). That language is fully consistent with a Commission decision to (1) tell a subpoenaed entity to comply, and (2) consider other steps only if that order is itself disobeyed. 2/ Indeed, the Hearing Officer already has availed itself of the oral-ruling option to thwart an earlier USS effort to limit the deposition (noticed under the same subpoena at issue here) of one of USS' principals, Wil Arnett.

Second, under Section 503(b)(5) of the Act, the Commission can issue a citation to a non-compliant subpoenaed party ordering it to obey, and if the party still disobeys, the Commission can issue a forfeiture order. This procedure applies even against non-licensees, and it was used as recently as last year: In *1st Source*

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2/ None of the cases cited by USS are to the contrary. They stand for the proposition that the courts can and will help the Commission enforce subpoenas on request. They certainly do not say that the Commission may not attempt to secure subpoena compliance itself before enlisting the aid of an Article III judge.

*Information Specialists, Inc. d/b/a LocateCell.com, Apparent Liability for Forfeiture*, 21 FCC Rcd 8193 (2006) ("LocateCell"), the Commission issued a forfeiture order against a company that—just like USS—was not a Commission licensee and had refused to obey a Commission subpoena. In *LocateCell*, the Commission issued a subpoena and received only a partial response. Weeks later, the Enforcement Bureau issued a citation to the company under Section 503(b) and warned: "[i]f, after receipt of the Citation, you continue to refuse to comply with the Commission's orders in any manner described herein, the Commission may impose monetary forfeitures." *Id.* at 8194. The subpoenaed company still did not comply, and the full Commission responded by ordering maximum forfeitures. It wrote that Section 503(b)(5) gave it the authority to issue citations to non-licensees ordering them to comply with subpoenas. *Id.* at 8196. "The Citation . . . required *LocateCell* to respond in full to the subpoena," the Commission wrote. *Id.* (emphasis added). "Subsequently, *LocateCell* again failed to comply with the obligation to produce information as required by the subpoena and the Citation. Accordingly, we issue this Notice of Apparent Liability finding that *LocateCell* has apparently willfully and repeatedly violated Commission orders." *Id.* The Commission, moreover, made crystal clear that it would aggressively enforce its subpoenas going forward:

*Responding to Commission subpoenas is not optional. We expect that subpoenas, as well as all of our requests for information, will be responded to completely and promptly. . . . As I have said previously, it is my hope that, in the future, our statutory maximum [forfeiture penalty for disobedience] will be increased. If companies such as LocateCell have no incentive to comply with our requests for information, our enforcement processes will be severely compromised.*

*Id.* at 8198 (Separate Statement of Chairman Kevin Martin) (emphasis added). It is literally impossible for USS to argue, in the face of *LocateCell*, that the Hearing Officer has no options to enforce the subpoena. USS' Motion must fail for this reason alone.

Third, even if the Hearing Officer chooses not to employ the 503(b)(5) power, he certainly can issue an order instructing USS to obey the subpoena or face a Commission request in federal court for a contempt order. Indeed, this appears to be the very procedure contemplated by the statute. See 47 U.S.C. § 409(f). The statute does not require the Hearing Officer to run to court before he has even reaffirmed to the disobedient entity what is required to comply with the subpoena's terms.

In short, a Section 409(f) enforcement proceeding is not the *first* step to enforcing a subpoena, it is the last—or at least one of the last. (The final subsection of Section 409, subsection (m), which criminalizes the refusal of “[a]ny person” to comply with a Commission subpoena, would seem to be truly the last). It marks the distant boundaries of the Commission's and the Hearing Officer's considerable subpoena enforcement powers, and its use hopefully will not be necessary here. However, should the Hearing Officer decide not to issue an order of his own compelling USS to obey the subpoena, Complainants ask that this Opposition be construed as a request that the Commission seek federal-court enforcement of the USS subpoena.

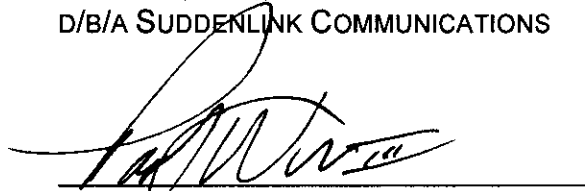
For these reasons, Complainants respectfully request that USS' Motion be denied and that Complainants' July 9, 2007 Motion to Compel Utility Support System's Inc.'s Compliance With Subpoena *Duces Tecum* be granted in all respects. 3/

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3/ USS notes, correctly, that its counsel sought Complainants' counsel's consent to a 10-day response period after any denial of USS' Motion to Strike to file a response to Complainants' July 9, 2007 Motion to Compel and that Complainants refused. USS

Respectfully submitted,

ARKANSAS CABLE TELECOMMUNICATIONS  
ASSOCIATION; COMCAST OF ARKANSAS, INC.,;  
BUFORD COMMUNICATIONS I., L.P. D/B/A ALLIANCE  
COMMUNICATIONS NETWORK; WEHCO VIDEO, INC.,;  
COXCOM, INC.,; AND CEBRIDGE ACQUISITION, L.P.,  
D/B/A SUDDENLINK COMMUNICATIONS



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July 13, 2007

Its Attorneys

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Motion to Strike at 3. Complainants' refusal to provide such consent was based on (1) the fact that the subpoena was issued nearly one year ago; (2) the potentially serious nature of USS' (and Respondent's) document withholding; and (3) Complainants' weeks-long effort to resolve this issue informally. Complainants, note, moreover, that they were concerned that USS might seek to delay further compliance with the Hearing Officer's subpoena. This concern appears well founded given (a) the fact of USS' Motion to Strike; (b) the position that USS has taken in that motion that the Commission is powerless to enforce its own subpoenas short of bringing a federal lawsuit; and (c) its warning that it may "seek other appropriate relief" apart from either responding to Complainants' Motion to Compel or complying with subpoena.

## CERTIFICATE OF SERVICE

I, Paul A. Werner, hereby certify that on July 13, 2007, a copy of the foregoing **OPPOSITION TO UTILITY SUPPORT SYSTEMS, INC.'S MOTION TO STRIKE** was hand-delivered, and/or placed in the United States mail, and/or sent via electronic mail, postage prepaid, to:

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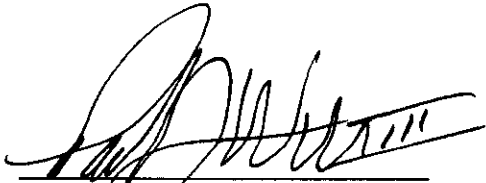
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